No. 1074

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IN THE

Supreme Court of the United States

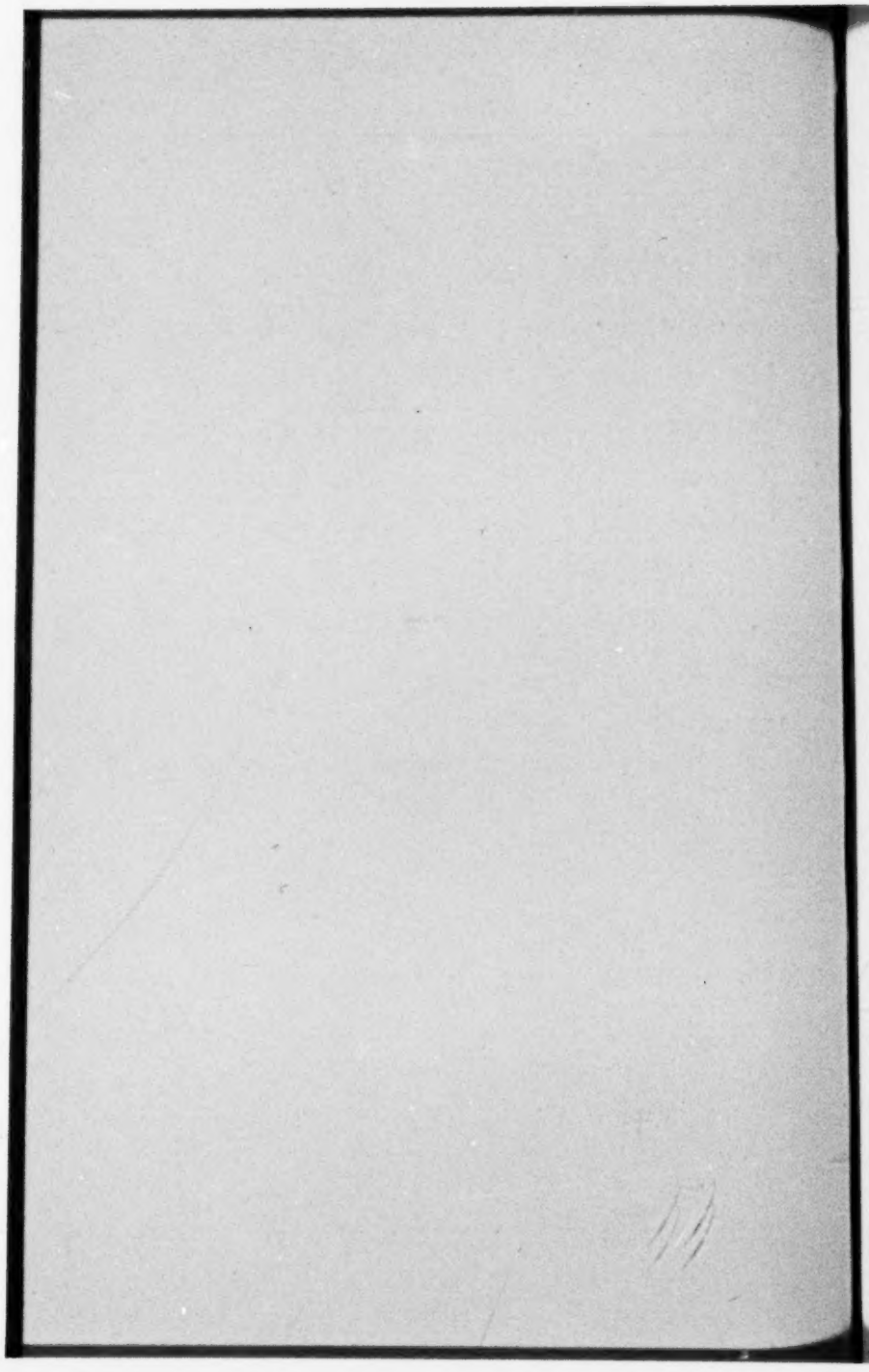
OCTOBER TERM, 1940

THE SOLVAY PROCESS COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT



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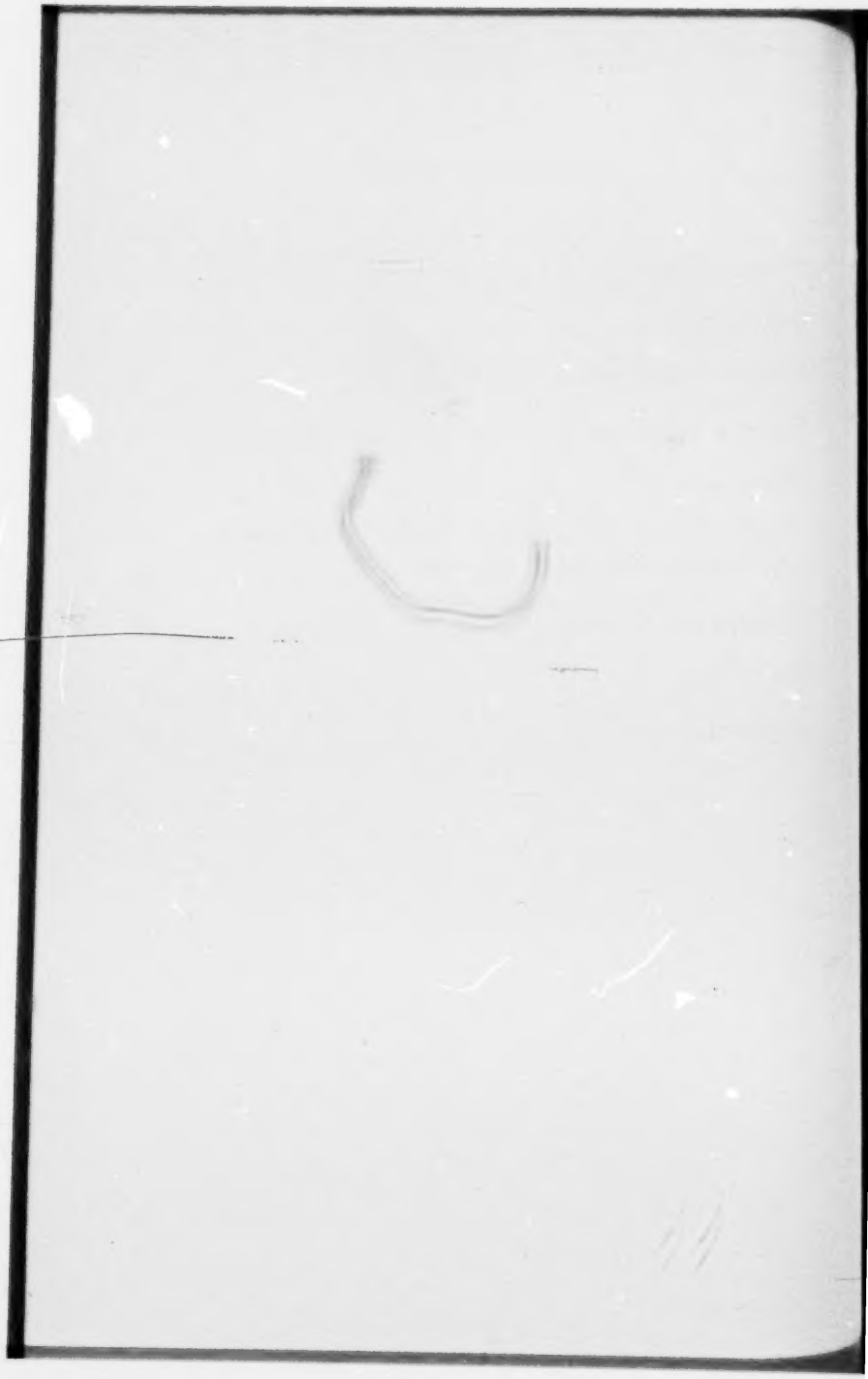

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No. ———

THE SOLVAY PROCESS COMPANY,

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solvay Process Company (herein called "petitioner") respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit entered March 27, 1941, modifying, and enforcing as so modified, an order issued March 22, 1940, against petitioner by the National Labor Relations Board (herein called the "Board").

OPINION BELOW

The opinion of the Circuit Court of Appeals (Tr. 272)* is reported in 117 F. (2d) 83. The findings of fact, conclusions of law and order of the Board (Tr. 208-45) are reported in 21 NLRB No. 90.

JURISDICTION

The order of the Circuit Court of Appeals dismissing the petition for review filed by petitioner was entered January 4, 1941. Application for a rehearing, duly filed, was denied by the Court March 8, 1941. The final decree was entered March 27, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act (herein called the "Act").

QUESTIONS PRESENTED

The questions presented are:

1. Whether the Board's finding of interference, restraint and coercion in violation of Section 8 (1) and of domination of and interference with the formation and administration of an unaffiliated union in violation of

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*Pursuant to the stipulation of the parties (Tr. 315), the printed record, for purposes of the petition for writ of certiorari, consists of four volumes. The first volume, entitled Volume I, Transcript of Record, contains the proceedings in the Circuit Court of Appeals and is referred to herein as (Tr.). The second and third volumes contain the portions of the record printed in two volumes by petitioner as an appendix to its brief in the Circuit Court of Appeals. These are referred to herein as (P. A.) and (P. A. II), respectively. The fourth volume of the record consists of the portions of the record printed by the Board as an appendix to its brief in the court below, referred to as (B. A.). The typewritten transcript of the evidence, consisting of two volumes, is referred to herein as (T. T.).

Section 8 (2) of the Act are supported by substantial evidence.

2. Whether petitioner, with its excellent background of labor relations and a consistent policy to comply with the provisions of the Act, having issued repeated instructions to all supervisory employees to remain neutral and not to interfere with or participate in organizational activities, and having been guilty of no discrimination of any kind, can be held responsible for unauthorized and ineffective efforts of minor supervisory employees whose actions were promptly repudiated by the management by notice to all employees.

3. Whether the statements attributed to certain minor supervisory employees were made in the proper exercise of their right of free speech guaranteed by the First Amendment to the Constitution of the United States.

4. Whether statements attributed to petitioner's general superintendent* were made in the proper exercise of his right of free speech guaranteed by the First Amendment to the Constitution of the United States.

5. Whether the Board's determination of the unit of employees for bargaining purposes and the majority representative in such unit without an election was arbitrary, improper and an abuse of discretion.

6. Whether, as a matter of law upon the evidence presented, petitioner can be held to have refused to bargain with the complaining union in violation of Section 8 (5) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Act are set forth in the Appendix.

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*Opinion C.C.A.-5 (Tr. 276)

STATEMENT

(1) Alleged Violations of Section 8 (1) and (2)

The court below found the actions of two of petitioner's lowest ranking supervisory employees—Hurt, machine shop foreman, having but 12 or 14 employees under him, and Hargroder, electrical foreman, having but 6 employees under him—to be "unwarranted interference in, and restraint of, the employees in the exercise of their right of self-organization", and that "the Board was justified in inferring that the attempts of the foremen to use the influence inherent in their positions to persuade their subordinates to join one union in preference to another contributed support" by petitioner to Solvay Employees Council, an unaffiliated organization (herein called the "Council"). This finding was made "Although the consistent policy of the company, as repeatedly announced by its proper officials, was to comply with the provisions of the National Labor Relations Act by permitting its employees to organize a labor union and to bargain collectively through representatives of their choosing without interference, restraint, or coercion from the management, and although the actions of the foremen were contrary to the orders of the company management and to the express policy of the company ***". (Opinion C.C.A.-5, Tr. 275).

Petitioner has an unimpeachable background of labor relations. From the outset of operations in 1935 petitioner's employees have had full freedom to exercise their rights to organize and choose representatives (P. A. 360; 391-2; 416-17; 428-9). Petitioner has always encouraged the friendly adjustment of any questions as to wages, hours and other working conditions (P. A. 18-19; 429; 452-3); has never inquired about the

union affiliations of its employees (P. A. 259; 358; 394; 433); has never employed labor spies or informers or had any kind of espionage system (P. A. 431; 463); has never permitted the use of firearms on its property or employed special officers or guards (P. A. 377; 452), and has never in any way disciplined or discriminated against its employees for union activities (P. A. 62-4; 82; 90; 93; 95; 96; 98; 100-2; 104-7; 111; 113-14; 120; 193-4; 405; 433-4; 442; 449-50) as stated without contradiction by the fifteen Board witnesses who testified on the subject. It had no labor difficulties of any kind until the present controversy arose in March 1938 between Oil Workers International Union, Local No. 424, affiliated with the Congress of Industrial Organizations (herein called the "Union") and the Council. That the petitioner's position was a working and not a theoretical attitude is further demonstrated by its history of bargaining with an AF of L union of quarry employees operating as a separate organization 150 miles away from the plant, but, like the plant, in charge of Bates, its general superintendent (P. A. 200-1; 422). The Board made no finding with respect to this favorable record and the court below gave it no weight.

Organization on behalf of the Union began in March 1938 and its solicitors extensively engaged in their activities on plant property during working hours (P. A. 26; 51-2; 54-5; 59; 65; 80; 110-12; 150; 156-7; 160-1; 221; 224; 226; 230-1; 241-2; 337; 405; 442; 477; 483). In normal course, knowledge of these activities soon became known to Bates, General Superintendent, and to Nill, Assistant General Superintendent, (P. A. 396-7; 430-1; 486-7). Instructions were immediately issued to the entire supervisory force that they could not and must not have anything to do with the employees' ef-

forts to organize, and from time to time these instructions were repeated (P. A. 242-3; 247; 253-4; 260-1; 268; 271; 290; 302; 326-7; 334-5; 34[illegible]; 391-2; 398-9; 402; 432; 445-6; 462).

Many of petitioner's non-supervisory employees were opposed to the Union (P. A. 19-20; 51; 54-5; 230-1; 276; 283; 294; 303; 396; 401-2; 473-4; 479-80). They had been told they would be "run out" if they did not join the Union and asked Hurt whether they could form an organization to combat it. Hurt properly told them they did not have to join anything in order to work for him (P. A. 283; 294; 486).

Hurt had once belonged to a union, had been called out on strike and had lost his home and everything he had. He had been told that the Union intended to force him out (P. A. 282-5; 297). Hargroder, who shared his office, was told he would receive the same treatment (P. A. 308). Disturbed, they took the matter up with their superiors and were told by Bates that "regardless of what labor activity went on in the plant * * * (they) could have absolutely no part in it; that the men had a perfect right to organize if they wanted to". (P. A. 283-4; 301-2).

Some of the employees in the shop expressed to Hurt and Hargroder their preference for an unaffiliated organization and asked Hargroder, who customarily "favored the men by writing letters" and attending to other matters for them, to write out a "petition" as dictated to him. This he did and later made several copies on the typewriter for them (P. A. 284; 302-304). These employees expressed doubt as to their right to organize independently, and Hargroder, at their request, took the "petition" to Bates and was asked whose idea it was (P. A. 303-4). He told Bates it was the men's idea and was told by Bates that the men had a "perfect right

to organize", that it was a matter for the men to decide, that "the Company could not take any sides" and "couldn't encourage it in any way". Bates reminded Hargroder that he "was part of the management and could play no part in it" (P. A. 304; 401; 462). Hargroder returned the "petition", stating what Bates had said (P. A. 304). One of the employees wanted to get signatures to the "petition" and in the presence of Hurt started to carry it into the shop, was told by Hurt not to do that, and, when asked if Hurt's office could be used for the purpose, was told that it could (P. A. 285). Hurt and Hargroder told several employees that the "petition" was in the office (P. A. 296; 309).

The same day an employee from another department came over to the shop, was shown the "petition", got into a "pretty heated discussion" with Hurt and took the "petitions" away "to see how many men wanted an independent organization and, if it looked like there were enough, we would have an independent organization" (P. A. 18-24). Neither Hurt nor Hargroder ever saw the "petitions" after that, although during the following two days they expressed their personal opinions to some of the employees unfavorable to the Union and favorable to the idea of an independent organization (P. A. 286; 289; 298; 305; 309; 312).

Three days later, March 20th, several non-supervisory employees called a meeting (P. A. 31) to see if there were sufficient interest to organize an unaffiliated union free of any company influence (P. A. 5). Carloads of Union men attended and succeeded in breaking up the meeting (P. A. 5-6). The next day a practicing attorney in Baton Rouge, having no connection with petitioner, was engaged by the employees to assist in organizing an independent union (P. A. 34). Upon advice of counsel the so-called "petitions" were entirely discarded as be-

ing "nothing more or less than an agreement to agree and therefore of no earthly use" (P. A. 29; 35; 490). Under the guidance of the attorney, organization was started, by-laws formulated, a small office rented and headquarters opened for the enrollment of members (P. A. 30-2; 35-7; 38-9; 50; 54; 466-7; 489-90; 495).

The record is barren of any evidence that any supervisory employee suggested the formation of any labor organization, or the name or form of the by-laws of the Council, or where a form of by-laws might be obtained, suggested the employment of an attorney or the name of any attorney, assisted in any way in the solicitation or enrollment of members of the Council, furnished any advice or suggestions as to administration or functioning of the Council, participated in any way in any election of officers or representatives of the Council, furnished or gave to the Council or any of its members, or its attorney any funds, credits, promises or future assurances or the use of plant property, or facilitated or dominated or interfered with the actual formation or administration of the Council, or contributed any financial or other support of any kind to the Council (P. A. 32; 35; 53-4; 259; 416-17; 439; 451-2; 489-90; 495).

At a meeting held March 22, 1938, between Bates and representatives of the Union, Kinstley, "outside" organizer for the Union, accused petitioner of forming a company union through coercion and intimidation by Hurt and Hargroder (P. A. 7-8). Bates denied the accusation saying that company unions were illegal (P. A. 437) and made it perfectly clear to those present that employees were free to join any union they chose (P. A. 105). By the time the meeting was over Hurt and Hargroder had left the plant, but the next morning Bates called them into his office, related what Kinstley had

said and told them emphatically that they must remain absolutely neutral (P. A. 438; 459).

At a second meeting on April 2nd Kinstley again charged that the Council was dominated by petitioner and threatened "to take it to the Labor Board and break it up". Bates again denied the accusation and told Kinstley he could take such action as he thought necessary "as that was his privilege" (P. A. 408; 441). In Kinstley's presence Bates asked whether or not Hurt was active against the Union. One of the committee members who worked under Hurt replied that he was not (P. A. 442).

April 5th the Regional Director of the Board advised petitioner the Union had filed a charge that petitioner had violated the Act and a petition for investigation and certification of representatives, and asked petitioner to state its position in the matter (P. A. II, 58). April 8th petitioner advised the Regional Director the charge was untrue, that it was petitioner's policy to comply fully with the Act, that it had scrupulously avoided taking any part in or interfering in any way with any organizational activities of its employees and that it would appreciate a frank discussion of the matter (P. A. II, 59).

April 29th Bates met with the Regional Director (P. A. 444; T. T. 2466; Resp. Ex. 28) who stated he had written charges against petitioner. Thereafter Bates called Hurt and Hargroder to his office, telling them of the charges filed with the Board. Hargroder denied he had violated his instructions and assured Bates he would continue to observe them (P. A. 311-12). Hurt failed to deny the charge made against him and Bates told him "if he wanted to stay there that he had to keep out" of labor organization activities, or in the words of

Hurt "He told me enough to let me know that I either had to quit that or get out of the plant" (P. A. 285-6; 289; 446). While Hurt had done nothing in regard to the "petitions", except for two days after they were written, he had continued from time to time expressing his dislike for the Union, but, after Bates' warning, he "quit talking" (P. A. 99; 288-290).

To correct any misunderstanding that might have arisen among the employees as to petitioner's attitude, Bates posted the following notice (P. A. 445; P. A. II, 53) and sent a copy to the Regional Director (P. A. 446):

"NOTICE

> The Management of the Baton Rouge plant of The Solvay Process Company has recently been advised of statements said to have been made by some of its employees claiming that certain supervisory employees had encouraged or discouraged other employees with respect to labor organization activities.
>
> While the correctness of such statements has been questioned, any such action would be contrary to the Management's policy and instructions.
>
> It is the policy of the Management to comply with the National Labor Relations Act as in the case of any other valid law of the country.
>
> The Management recognizes, and will continue to comply with, the principles of collective bargaining as embodied in the National Labor Relations Act.
>
> The Management, as heretofore, will not in any way interfere with, restrain or coerce its employees in the exercise of the rights guaranteed and granted them under Section 7 of the National Labor Relations Act, which reads as follows:
>
> > 'Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.'

The Management has not discriminated and will not discriminate against any of its employees because of their membership in, affiliation with, or lawful activities in behalf of any labor organization, and as heretofore will not in any way discourage or encourage membership in any labor organization.

CARLTON BATES
General Superintendent."

This notice remained posted continuously in the most conspicuous place in the plant for more than two months, was then reposted at the same place (where it is today) and was read and fully understood by petitioner's employees (P. A. 222; 228; 232; 445; 475; 477; 484; 487-8).

The court below finds that several employees, namely, Duff, White and Robinson, "testified that they were intimidated, interfered with and restrained from joining the CIO union and that they were coerced to join the SEC which was fostered and supported by the company" and that "Most of this testimony was corroborated by the frank testimony of Hurt and Hargroder" (Tr. 275).

But Duff testified he did not sign even a "petition". He was president of the Union, known as such, and stated that he had never been discriminated against in any way by the officials or foremen (P. A. 62). White testified he was a member of the Union, not the Council. He refused to participate in the solicitation of signatures to the "petition" although he testified Hargroder

asked him to do so. (B. A. 33), and he tore up a Council card when he was solicited for membership in that organization (B. A. 36). Robinson testified he signed a "petition" in Hurt's office, that there was nothing in it that the Union could object to since "it was just to call one special meeting", and that the next day he told Hurt he had joined the Union (B. A. 118-19). He further testified that Hurt had always treated him "good" (P. A. 120).

There is no evidence whatever that anyone renounced his membership in the Union or joined the Council because of anything Hurt and Hargroder did or said. The ineffectiveness of their efforts to aid in obtaining signatures to the "petition" is manifest. Assuming Hurt "saw the entire force of twelve or fourteen men in the machine shop go into the office to sign the petition" (Tr. 217), at least three of them had discussed the formation of an independent union before either Hurt or Hargroder ever heard about it and were the instigators of the "petition" (P. A. 294). Of the remaining nine or eleven men supposed to have been influenced by Hurt and Hargroder seven removed their names from "the petition" the following day (P. A. II, 27) and three of the others soon thereafter joined the Union (P. A. 140-2). The "petitions" themselves were completely abandoned four days later.

(2) Alleged Refusal to Bargain

The court below sustained the Board's finding that petitioner refused to bargain with the Union, thus of necessity holding, though not stating, that the unit designated by the Board was appropriate for bargaining purposes. This unit consisted of 212 of 253 employees other than those classed by petitioner as supervisory or

clerical, thus excluding 41 additional employees. Petitioner agreed to the exclusion of but one—a relief loading foreman (P. A. 133; 382). The Board included 14 temporary employees, the exclusion of all of whom petitioner sought. Petitioner's contentions were based solely on the ground that it wished to bargain with a representative and cohesive plant unit. The Board's decision is remarkable in that of the 14 temporary employees included in the unit only 2 had designated the Council as its bargaining agent and of the 41 excluded none had designated the Union as its bargaining representative.* Thus by the simple expedient of adopting the Union's contentions, except in two instances (a negro porter and a relief head operator), wholly regardless of consistency and at times basing its findings upon the desires of the Union as "the only union involved", the Board has, on the one hand, included Union members who rightfully should have been excluded, and, on the other, excluded non-Union members who should have been included, thus establishing a unit in which alone the Union could claim a majority.** The court below, by its decision, gives retroactive conclusiveness to the Board's finding and charges petitioner with knowledge of the unit found appropriate by the Board two years before its establishment and in spite of the fact

*One head operator designated the Union but later joined the Council.

**If petitioner's contentions be accepted, the appropriate unit on April 2nd, the date of the second and last meeting with the Union, would consist of 237 employees, i.e. 253 employees on the non-supervisory payroll less 16 temporary employees. Giving full credence to the testimony of the Board's witnesses regarding the dates on which union petitions and cards were signed, 137 out of 237 employees had designated the Union on April 2nd, but 22 of the 137 had likewise designated the Council on such date, and at least one member of the Union had revoked his designation in the latter part of March (P. A. 82; 473-4). Therefore, these 23 employees cannot be considered as having *exclusively* designated the Union as their representative, regardless of whether or not the Council was a valid organization and their designation must be deducted from the 137 to ascertain the number represented by the Union on April 2nd. This leaves but 114 as against a majority of 119.

that no such unit was at the time considered by any one as appropriate (P. A. II, 7).

Petitioner had two meetings with the Union, March 22, 1938, and April 2, 1938. The first meeting, as stated by the Board, "finally ended with a promise by Bates to consider the matter and give the Union an answer in about a week" (Tr. 237), which promise was accepted and acted upon by the Union. Thus the entire question of proof of majority representation, recognition and bargaining was, by agreement of the parties, postponed for consideration at a future meeting.

Three days later Bates received a letter from the Council claiming to represent a majority of the employees and requesting a meeting. The meeting was held March 28th. The Council demanded recognition but was told that another organization claimed a majority and that no answer could be given (P. A. 40-1; 439-40; 491-2; P. A. II, 28).

Thereafter the Council wrote the Board's Regional Director offering to exhibit all its records and claiming majority representation (P. A. II, 32). A petition for certification as the sole bargaining agency for petitioner's employees was filed by the Council on April 4th (P. A. II, 34). No action has ever been taken on it.

Saturday morning, April 2nd, Kinstley telephoned Bates and requested a meeting that day. Although inconvenient, Bates and Nill met with Kinstley and six employees. Kinstley renewed his assertion of majority representation, but *for the second time refused to disclose the number of employees he claimed to represent** (P. A. 75; 104; 407-8; 440-1).

Bates said the Council also claimed to represent a

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*See footnote ** on preceding page.

majority of the employees and, since both groups could not represent a majority at the same time, he could do nothing about it* (P. A. 10; 408; 441; 457). As heretofore stated (ante p. 9), Kinstley charged that the Council was company-dominated, and threatened "to take it to the Labor Board and break it up". Three days later petitioner was advised by the Regional Director that charges had been filed (P. A. II, 58). No further effort was ever made by the Union to confer, present evidence of authority or bargain with petitioner (P. A. 414; 451).

Petitioner's dealings with the Council show the complete absence of any effort to gain "any advantage in the bargaining process of a kind which the Act proscribes". After its meeting on March 28th, the Council made no further overtures for recognition or negotiations until June 6, 1938, when its representatives met with Bates and demanded he bargain with them. Bates told the Council he could give no answer (P. A. 446-7). He conferred with the Regional Director who said he could give Bates no advice in the matter, that Bates would have to use his own judgment (id.). Thus forced to rely upon himself and in an honest effort to deal impartially with the contending unions, both of which had filed petitions for certification, Bates advised both the Council and the Union that as a temporary expedient he would recognize and bargain on a membership basis with whichever organization presented evidence showing it represented a majority of the employees and established the authority of those purporting to represent the organization, with the understanding that any concessions or changes resulting from such bargaining

*Compare Bates' answer to the Council's request for recognition (ante p. 14).

would apply to Union and Council members without discrimination (P. A. 412-13).

June 10th, representatives of the Council presented to Bates and Nill approximately one hundred forty membership cards signed by non-supervisory employees, constituting a majority of the employees at petitioner's plant (P. A. 413; 448-9; 493). The signatures on such cards were authenticated by comparison with the signatures on employment application blanks (P. A. 413; 448-9; 466). Bates then stated that in accordance with the conditions imposed by him he would give the same opportunity to the Union to prove its claim to majority representation (P. A. 58; 413-14; 449; 493). The Council left with Bates a schedule of wage increases which it proposed (P. A. 449). The meeting closed without any discussion of the Council's demands and without any recognition being accorded the Council (P. A. 413; 449; 493).

Immediately after this meeting, Bates called in Duff, president of the Union, informed him fully of what had taken place at the meetings with the Council, and offered the Union the opportunity of proving its claim (P. A. 58; 413; 449; 465; 493). Duff declined to present any evidence of the validity of the Union's claims, merely stating that the Union did not regard the Council as legally existing and that the thing the men were interested in anyway was more pay, regardless of who was responsible for obtaining it (P. A. 414; 449). In the words of Duff himself:

> "* * * he (Bates) wanted me to know just what steps that they had done in that respect so that I would have the same advantage that they would have. In other words, *he was giving me the same break that he was giving them*" (P. A. 58. Italics added).

June 13th, the Council committee again met with Bates, requested an answer to their demands, and were granted temporary recognition as the representative of Council members only (P. A. 415; 450). The schedule of increased pay previously proposed by the Council was again brought up. Petitioner presented counter proposals. After hours of bargaining a compromise schedule of increases was finally agreed upon which, in accordance with the condition imposed by Bates, was made applicable to employees regardless of their union affiliation (P. A. 42; 415; 450-1; 493-4).

Subsequently the Council took up with Bates certain grievances on behalf of its members and bargained with petitioner in respect thereto (P. A. 455). In contrast, the Union never presented any matters to petitioner upon which bargaining could be had, nor did it ever demonstrate its asserted right to become the bargaining agency either for its own members or for all employees in an appropriate bargaining unit, although given full opportunity to do so (P. A. 7; 98; 104; 114; 408; 414; 435; 438; 441; 449; 451).

The appeal for advice from constituted authority having failed, with charges filed by the Union and petitions for certification filed by both labor organizations, Bates gave to each the same opportunity to bargain, but recognized neither as the exclusive representative of the employees.

REASONS FOR GRANTING THE WRIT

The basis upon which the Circuit Court of Appeals decreed the enforcement of the Board's order as modified presents, it is submitted, questions of general importance in the administration of the Act.

1. The court below found petitioner had violated

Section 8 (1) and (2) of the Act solely on account of the activities of Hurt and Hargroder, two of the lowest ranking supervisory employees in the plant having but a few men under them. It held Hurt and Hargroder to be part of the management while engaged in their unauthorized and disobedient activities merely because they "were recognized by the manager of the Company as occupying supervisory capacities as a part of the management, and, as such, constrained to remain aloof from and neutral to any organization activities of the employees" (Tr. 274-5). This finding was based solely upon the fact that Hurt and Hargroder "were advised by the manager that the employees had the right to organize if they chose, that the company management could not participate in their councils or actions in any way, and that the two foremen, being of the management, would have to remain completely neutral" (Tr. 274). If such finding be the law, employers are enjoined from issuing instructions to their supervisory forces to comply with the terms of the Act lest they become insurers of the observance of the instructions issued. The decision of the court below converts efforts to comply with the Act into liabilities for unauthorized acts beyond the scope of the offenders' employment. Observance of the law thus becomes an unwarranted risk and the purpose of the Act is to that extent defeated. That such instructions as those given should have been given is implicit in the decisions of this Court in the *Heinz* and *Link-Belt* cases, *infra*.

2. The opinion of the court below conflicts with the operative interpretation of the Act by this Court in *Heinz Co.* v. *Labor Board,* 85 L. Ed. 303, and *Labor Board* v. *Link-Belt Co.,* 85 L. Ed. 325, both decided January 6, 1941. In those cases this Court held that employer responsibility must be based "on the existence

of conditions or circumstances which the employer created or for which he was fairly responsible", from which he has gained some "advantage in the bargaining process of a kind which the Act proscribes". Failure of the employer promptly to repudiate the objectionable activities of supervisory employees and belated instructions to such employees were held to be strongly corroborative of the employer's guilt.

In sharp contrast with the facts in the *Heinz* and *Link-Belt* cases is the factual picture presented by the uncontradicted evidence in this cause:

(a) An excellent background of labor relations, including a friendly and cordial relationship between the supervisory force and the non-supervisory employees, and the complete absence of any discrimination or threats of discrimination, labor espionage system or strikes (ante pp. 4, 5).*

(b) A consistent policy of petitioner (found to exist by the lower court in its opinion)** "to comply with the provisions of the National Labor Relations Act by permitting its employees to organize a labor union and to bargain collectively through representatives of their choosing without interference, restraint or coercion from the management, * * *".

(c) At the very outset of the labor organization activities in March, 1938, the issuance by petitioner of proper instructions to all supervisory employees to remain neutral and not to interfere or participate in such activities (a course meeting the approbation of the

*It has been held that a favorable history should be constantly borne in mind. *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332; *Martel Mills Corp.* v. *N.L.R.B.* (CCA-4), 114 F. (2d) 624.

**No apparent weight is accorded this policy. The lower court disposes of it by simply stating its existence. Such "consistent policy" is of necessity inconsistent with any of the elements required in order to hold petitioner responsible for acts of its foremen contrary to instructions. With this policy established, there can be no question of authorization, advantage gained or ratification.

lower court in *N.L.R.B.* v. *Whittier Mills Co.*, 111 F. (2d) 474, and of this Court in the *Heinz* and *Link-Belt* cases, *supra*), and the repetition of such instructions on numerous occasions (ante, pp. 5, 6).

(d) The fact that the activities of Hurt and Hargroder, two of the lowest ranking supervisory employees in the plant, having but few men under them, (1) were dictated by their personal fear of loss of employment in the event the CIO organized the plant; (2) were continued only for a very limited period, and (3) were directly contrary to precise and repeated orders.

(e) The ineffectiveness of Hurt's and Hargroder's unauthorized activities.

(f) Petitioner's evenhandedness, and its consistent effort to hold the scales balanced in all petitioner's relations with the Union and the Council.

(g) Not only the complete absence of "any advantage (to petitioner) in the bargaining process of a kind which the Act proscribes" and of any effort on the part of petitioner to gain such advantage from the activities of its minor supervisory employees complained of,—but, on the contrary, the continuing refusal of petitioner down to the present date to accord recognition to the Council as the exclusive representative of petitioner's employees and to bargain with the Council as such representative.

(h) And finally, the compelling consideration that in this case there was that which was missing and regarded as so important in the *Heinz* and *Link-Belt* cases—a forthright and timely* public statement of neutrality

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*Bates admittedly had given direct and precise instructions to both Hurt and Hargroder to remain neutral. He had no good reason to believe that they were violating his instructions until his interview with the Regional Director on April 29 and his interview with Hurt and Hargroder thereafter. At the April 2, 1938, meeting when Kinstley stated that the foremen were active against the CIO, Bates asked Hulbert, a member of the Committee who worked under Hurt and who was present at the meeting, whether Hurt was active against the Union and he was told that Hurt was not. (P. A. 441-2).

and repudiation by petitioner of activities attributed to supervisory employees encouraging or discouraging labor organization activities (ante pp. 10, 11).

It is submitted that this Court's conclusions of law in the *Heinz* and *Link-Belt* cases sustain petitioner's contention that it should not have been made responsible for the unauthorized acts of its minor supervisory employees which were contrary to its express instructions and declared policy, not in its interests, and publicly repudiated in unequivocal terms.

Not only does the decision of the court below conflict with the philosophy of the Act as announced by this Court in the cases cited but it is in conflict with this Court's decision in *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, in which it was held that anti-union statements of supervisory employees comparable to Hurt and Hargroder were not evidence of the employer's policy.

3. The decision of the lower court that there was substantial evidence to support the Board's finding of violations of Section 8 (1) and (2) of the Act by petitioner is in conflict with prior decisions of that court in *Magnolia Petroleum Co.* v. *N.L.R.B.*, 112 F. (2d) 545, and *Humble Oil and Refining Co.* v. *N.L.R.B.*, 113 F. (2d) 85, and with the decisions of the Circuit Courts of Appeals for the Second, Third, Fourth, Sixth, Seventh and Eighth Circuits in the following cases: *Ballston-Stillwater Knitting Co.* v. *N.L.R.B.*, (CCA-2) 98 F. (2d) 758; *N.L.R.B.* v. *Swank Products Co.*, (CCA-3) 108 F. (2d) 872; *L. Greif & Bro., Inc.* v. *N.L.R.B.* (CCA-4) 108 F. (2d) 551; *N.L.R.B.* v. *Mathieson Alkali Works, Inc.* (CCA-4) 114 F. (2d) 796; *Martel Mills Corp.* v. *N.L.R.B.* (CCA-4) 114 F. (2d) 624; *E. I. du Pont de Nemours & Co.* v. *N.L.R.B.* (CCA-4) 116 F. (2d) 388; *N.L.R.B.* v. *Va. Electric & Power Co.* (CCA-4) 115 F.

(2d) 414, certiorari granted, 85 L. Ed. 727; *N.L.R.B.* v. *Empire Furniture Corp.* (CCA-6) 107 F. (2d) 92; *Foote Bros. Gear Mch. Corp.* v. *N.L.R.B.* (CCA-7) 114 F. (2d) 611, reversed on other grounds, 85 L. Ed. 197; *Jefferson Elec. Co.* v. *N.L.R.B.* (CCA-7) 102 F. (2d) 949; *N.L.R.B.* v. *Thompson Products, Inc.* (CCA-7) 97 F. (2d) 13; and *Cupples Co. Mfgrs.* v. *N.L.R.B.* (CCA-8) 106 F. (2d) 100.

4. The decision of the lower court that petitioner refused to bargain at the March 22, 1938, meeting, when the uncontradicted evidence shows and the Board concedes that the Union refused to tell Bates the number of employees it represented (Tr. 236; P. A. 113; 435), conflicts with the decision of the Sixth Circuit in *N.L.R.B.* v. *Empire Furniture Corp.*, 107 F. (2d) 92, which itself finds support in the decisions of this Court in *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, and *Labor Board* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292.

5. The decision of the court below that petitioner is guilty of a refusal to bargain because the Union "requested Bates to consent to the appointment of a disinterested third party to check membership cards against employment records, and determine which (union) had the majority" is in conflict with the decisions of the Circuit Courts of Appeals for the Second, Sixth and Ninth Circuits in the cases of *N.L.R.B.* v. *Remington Rand, Inc.* (CCA-2) 94 F. (2d) 862, cert. den. 304 U.S. 576; *N.L.R.B.* v. *Empire Furniture Corp.* (CCA-6) 107 F. (2d) 92, and *N.L.R.B.* v. *Union Pac. Stages, Inc.* (CCA-9) 99 F. (2d) 153, since a check of membership in competing labor organizations involving duplication of membership could not result in a proper determination of "which had the majority".

6. The decision of the lower court that, although the March 22, 1938, "conference finally ended with a promise by Bates to consider the matter and give the union an answer in about a week", which promise was accepted and acted upon by the Union, petitioner was guilty of refusing to bargain at that conference, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *N.L.R.B.* v. *Lightner Publishing Co.,* 113 F. (2d) 621, since the entire question of submission of cards to some disinterested party, recognition and bargaining was by agreement of the parties carried over until the April 2, 1938, meeting.

7. The decision of the court below that Bates' alleged criticism of Union members at the first meeting and his expressions of opinion formed a basis for holding that petitioner had refused to bargain with the Union is in violation of the First Amendment to the Constitution of the United States and in conflict with the decision of the Fifth Circuit in *Continental Box Co.* v. *N.L.R.B.* 113 F. (2d) 93, and the decisions of the Circuit Courts of Appeals for the Fourth, Sixth and Seventh Circuits in the cases of *Martel Mills Corp.* v. *N.L.R.B.* (CCA-4) 114 F. (2d) 624, *N.L.R.B.* v. *Ford Motor Co.,* (CCA-6) 114 F. (2d) 905, certiorari denied 85 L. Ed. 553, and *N.L.R.B.* v. *Lightner Publishing Co.* (CCA-7) 113 F. (2d) 621.

8. The decision of the court below that the activities of Hurt and Hargroder constituted unfair labor practices on the part of petitioner is in derogation of the right of those employees to freedom of speech guaranteed by the First Amendment to the Constitution of the United States. To hold petitioner responsible for such statements of its supervisory employees unlawfully compels petitioner to deprive its employees of

their guaranteed rights. *Martel Mills Corporation* v. *N.L.R.B.* (CCA-4) 114 F. (2d) 624; *Humble Oil & Refining Co.* v. *N.L.R.B.* 113 F. (2d) 85; *N.L.R.B.* v. *Ford Motor Co.* (CCA-6) 114 F. (2d) 905, certiorari denied 85 L. Ed. 553.

9. The decision of the court below that the independent organization of the Council by the employees after the so-called "petitions" were discarded was not a proper exercise by them of their right to self-organization uninfluenced by the activities of Hurt and Hargroder is in conflict with the decisions of the Fifth Circuit in the cases of *Magnolia Petroleum Co.* v. *N.L.R.B.* 112 F. (2d) 545; and *Humble Oil & Refining Co.* v. *N.L.R.B.* 113 F. (2d) 85.

10. The decision of the court below approving the action of the Board in determining the appropriate bargaining unit to be as specified in its decision and in determining on the record in this cause and without an election that the Union represented a majority in March and April 1938, we respectfully submit, was arbitrary, improper and an abuse of discretion and so far sanctions a departure by the Board from the accustomed and usual course of procedure as to call for an exercise by this Court of its power of supervision.

CONCLUSION

The decision of the court below enforcing the Board's order as modified is a departure from the principles laid down by this Court in determining the basis of the responsibility of an employer under the Act. It is in conflict with numerous decisions of other Circuit Courts of Appeals. In disregarding established principles and affirming the method which was adopted by the Board

in determining the bargaining unit of petitioner's employees and the bargaining representative of such unit, the decision raises questions of public importance concerning enforcement of the Act. For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

T. JUSTIN MOORE
Electric Building
Richmond, Virginia.

C. V. PORTER
Louisiana National Bank Bldg.
Baton Rouge, Louisiana.

EDMUND M. PRESTON
Electric Building
Richmond, Virginia.

May 1941

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C., Supp. V., Sec. 151, *et seq.*):

* * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the ma-

jority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *